No. 85-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE AND SOCIETE DE CONSTRUCTION D'AVIONS DE TOURISM,
Petitioners

versus

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF FOR COMPANIA GIJONESA de NAVIGACION, S.A. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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This brief of amicus curiae Compania Gijonesa de Navigacion, S.A., is presented in support of respondent, United States District Court for the Southern District of Iowa and respondents-real parties in interest Dennis Jones, John George and Rosa George. By letters previously filed with the Clerk of Court, petitioners and respondents-real parties at interest have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Amicus curiae, Compania Gijonesa de Navigacion, is a Spanish shipowning company and is the principal respondent in *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority*, No. 85-98 on the Court's docket. This Court has postponed any ruling on the *Anschuetz* petition pending the outcome of this case.

The *Anschuetz* decision, rendered by the United States Court of Appeal for the Fifth Circuit, was the first federal appellate court decision deciding the applicability of the Hague Evidence Convention[1] in federal litigation. *In Re Anschuetz & Co. GmbH*, 754 F.2d 602 (5th Cir. 1985). The rationale of the Fifth Circuit in *Anschuetz*, along with that of the same court in *In re Messerschmitt Bolkow Blohm GmbH*, 757 F.2d 729 (5th Cir. 1985) (No. 85-99 on this Court's docket), formed the basis of the decision of the United States Court of Appeals for the Eighth Circuit in this case. *See In re Societe Nationale Industrielle Aerospatiale*, 782 F.2d 120 (8th Cir. 1986).

This case, like No. 85-98, involves the applicability and scope of the Hague Evidence Convention and the discovery provisions of the Federal Rules of Civil Procedure in obtaining discovery from a foreign, Convention state national over whom the United States District Court has *in personam* jurisdiction. The Court's decision in this case will directly affect the Court's disposition of the *Anschuetz* petition.

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1. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, March 18, 1970, 23 U.S.T. 2555, T. I. A. S. 7444 (referred to in this brief as the "Hague Evidence Convention" or the "Convention").

STATEMENT

This case, like *Anschuetz* and *Messerschmitt*, involves a fact-setting repeating itself with increasing frequency. Plaintiff seeks recovery for personal injury or property damage caused in the United States by a defective product manufactured overseas. Plaintiff typically files interrogatories, requests for production of documents, and notices of depositions under the Federal Rules of Civil Procedure or the applicable state discovery rules. Usually, the persons and materials needed in response to the discovery requests are located at defendant's home office or manufacturing plant in a foreign nation. As a barrier to liberal U.S. discovery, and partially out of legitimate concerns of judicial sovereignty emanating from defendant's national government, the foreign defendant invokes the Convention, urging that its procedures are exclusive, or alternatively, a mandatory first choice, for obtaining the discovery information.

The Convention most often is invoked by foreign defendants in product liability litigation. However, the entire scope of U.S. civil and commercial litigation, from product liability litigation to complex securities, antitrust, and patent cases, often involves at least one foreign litigant and the possible invocation of the Convention.

This case is of immense importance to domestic and foreign litigants alike, as it will determine the manner and fairness by which litigants in federal and state courts conduct discovery and gather evidence for trial.

Amicus curiae, Gijonesa, the principal respondent in No. 85-98, in addition to being a third party plaintiff seeking discovery under the Federal Rules of Civil Procedure, is a foreign defendant subject to the "broad" scope of

discovery of the Federal Rules of Civil Procedure. Gijonesa submits that the plain language of the Convention and its history, along with fundamental fairness and important policy considerations, require a finding that the Hague Evidence Convention does not divest U.S. trial courts of authority to order domestic and foreign parties over whom the court has jurisdiction to submit to discovery in the United States. While each case should turn on its own facts, only rarely should litigants before U.S. courts seeking routine discovery from an opposing party be forced to proceed under the Convention.

SUMMARY OF ARGUMENT

The Hague Evidence Convention is not the exclusive method of obtaining discovery from nationals of Convention states who are party litigants over whom a U.S. court has *in personam* jurisdiction. The plain language of the Convention evidences no intent on the part of its drafters to make it the exclusive method of obtaining evidence from litigants in U.S. courts who are nationals of Convention states. Nor does the history of the Convention evidence any intent to make the Convention exclusive; its history demonstrates no intent to restrict U.S. courts from ordering foreign parties subject to their *in personam* jurisdiction to respond to discovery requests in the United States. Almost unanimously, United States courts which have considered the issue have concluded that it does not divest U.S. courts of jurisdiction to order discovery under U.S. discovery rules. Furthermore, the United States takes the position that the Convention is not exclusive.

Also, this Court should reject the alternative argument that as a matter of comity, evidence from abroad must first be sought under the Convention, regardless whether the U.S. court has jurisdiction over the party from whom

the evidence is sought. Establishment of a rule requiring use of the Convention as a first resort in all cases is inconsistent with comity, which requires a balancing of factors on a case-by-case basis. Requiring routine discovery from a foriegn litigant to proceed under the Convention will seriously threaten U.S. judicial sovereignty and policy. Most routine discovery requests do not significantly intrude foreign sovereignty so as to require, as a matter of comity, first resort to the Convention. Nor do foreign "blocking statutes" require deference to the Convention. The few instances where the balancing of factors requires deference to the Convention as a matter of comity do not justify establishment of a firm rule.

The Convention should be interpreted, in accordance with its purpose, to expand and expedite, at minimal cost, the evidence available to U.S. courts and litigants. This purpose is best achieved, and deference is afforded both to the judicial sovereignty of the U.S. and the foreign nation, by deciding on a case-by-case basis whether comity requires that discovery first proceed from a foreign party litigant under the Convention. While comity does not require the Convention to be used in seeking ordinary discovery from foreign litigants over whom the Court has *in personam* jurisdiction where such evidence can be produced or taken in the United States, the Convention must be used where the evidence sought is from a non-party, or where the evidence is incapable of being taken or produced in the United States and is not voluntarily forthcoming. Such a result gives effect to the intent of the Convention and is consistent with United States concepts of jurisdiction and discovery.

ARGUMENT

I. THE HAGUE EVIDENCE CONVENTION DOES NOT DIVEST U.S. TRIAL COURTS OF THEIR JURISDICTION TO ORDER FOREIGN LITIGANTS OVER WHOM THEY HAVE *IN PERSONAM* JURISDICTION TO RESPOND TO DISCOVERY IN THE UNITED STATES

Petitioner, as well as several amici curiae, submit that the Hague Evidence Convention provides the exclusive method of obtaining evidence from a Convention signatory state. They argue that use of the Convention is not, or should not be, a function of whether a court has jurisdiction over a party, and further, should not depend on where the evidence is produced. They argue that application of the Convention is mandatory any time the evidence sought must come from within the borders of a Convention state, even if the place of production of the evidence is in the United States.[2]

Admittedly, the language of the Convention makes no distinction between *parties* and *non-parties*. Nor does the Convention make any distinctions concerning the place of production of evidence. However, that the Convention makes no such distinctions is irrelevant. There is no question that the Convention *may* be used in obtaining evidence

2. *See* Petitioner's brief, 17-23; Amicus Curiae brief of the Government of Switzerland, 11-13; Amicus Curiae brief of the Federal Republic of Germany, 5-6; Amicus Curiae brief of the Republic of France, 14-16; Amici Curiae Brief of the Motor Vehicle Manufacturers Association of the United States, Inc., et al., 7-22; Amicus Curiae brief of the Italy-America Chamber of Commerce, Inc., 7-16.

from *parties* or *non-parties*. Also, the Convention *may* be used in obtaining evidence located in a foreign signatory state regardless whether the evidence is produced in the United States or in the foreign nation. The distinction between *parties* and *non-parties*, and authority to compel discovery production *in the United States* from *parties* but not from a *non-party*, stems from limitations on a U.S. court's jurisdiction. Rather, the question to be decided is, given the U.S. court's jurisdiction over domestic and foreign litigants before it, whether the Convention altered this jurisdictional power. Stated otherwise, the question is whether the Convention *must* be used by litigants in U.S. courts in obtaining discovery from parties before it who are foreign nationals of Convention states.

The Eighth Circuit, in this case, and the Fifth Circuit, in *Anschuetz* and *Messerschmitt*, correctly recognized that question of jurisdiction of a U.S. court over a controversy and the parties to the controversy is inseparable from the question whether the Convention *must* be used in obtaining evidence from a Convention state litigant over whom the U.S. court has jurisdiction. Clearly, the federal courts in these three cases had jurisdiction to compel the foreign party to produce evidence *in the United States*.[3] The language of the Convention and its history indicate that it in no way curbed the jurisdiction of U.S. courts to compel the production of evidence from foreign parties over whom the U.S. court has jurisdiction.

3. Fed. R. Civ. P. 37 provides the district court with broad discretion in compelling a party to comply with discovery requests. Indeed, this Court recently has authorized imposing sanctions where foreign parties did not comply with the district court's discovery requests. *See Insurance Corp. of Ireland, Ltd. v. Compagne des Bauxites de Guinee*, 456 U.S. 694 (1982).

A. The plain language of the Convention evidences no intent to deprive U.S. courts of jurisdiction to compel production of evidence from foreign parties over whom they have *in personam* jurisdiction

Analysis of the intent of the Convention "must begin . . . with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 105 S.Ct. 1338, 84 L.Ed.2d 289, 295 (1985).

The text of the Convention in no way indicates an intent to be the only method by which a party to U.S. litigation can obtain evidence from a foreign, Convention state national who is party to the same litigation. The text of the Convention evidences no intent to divest U.S. courts of their jurisdiction to compel foreign litigants before them to comply with discovery requests.

The preamble of the Convention is indicative of its intent:

> The States signatory to the present Convention,
>
> Desiring to *facilitate* the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
>
> Desiring to improve mutual judicial cooperation in civil or commercial matters,

> Have resolved to conclude a Convention to this effect and have agreed upon the following provisions–

(emphasis supplied).[4]

The preamble demonstrates an intent to broaden, not restrict, the methods available to U.S. courts in obtaining evidence from other signatory nations.

Likewise, no other provision of the Convention indicates any intent to divest U.S. courts, or the courts of any other nation, of their control over parties over whom they have jurisdiction. Although the Convention provides three methods of obtaining evidence from other signatory nations,[5] nothing in the Convention suggests that these three methods are the exclusive method by which courts or litigants in one nation can obtain evidence from another nation.

Nor does Chapter III, setting forth the "General Clauses," give any indication that the procedures outlined in the Convention are exclusive.[6]

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4. *See* text of the Convention as reproduced at VII *Martindale-Hubbell Law Directory*, Part VII at 12 (1976) (hereinafter cited as *Martindale-Hubbell*.)

5. The Convention authorizes the taking of evidence by letter of request (Articles 1-14), before diplomatic officers and consular agents (Articles 15-16, 18-22) and before commissioners (Articles 17-22). *Martindale-Hubbell* at 12-13.

6. Articles 23 through 42. *See Martindale-Hubbell* at 13-14.

B. The history of the Convention demonstrates no intent to limit the authority of domestic courts in obtaining evidence from parties over whom the court has jurisdiction

This Court has also looked to the history of treaties in determining their intent. *E.g. Air France v. Saks*, 470 U.S. at _____, 89 L.Ed.2d at 297.

Prior to the adoption of the Convention and its ratification by the United States, U.S. courts exercised their jurisdiction in ordering foreign parties over whom they had *in personam* jurisdiction to produce in the United States evidence or witnesses located in foreign nations. *See, e.g., Societe Internationale pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 438 (S.D.N.Y. 1984); 6 Whiteman, *Digest of International Law* 163-64, 169-71 (1968). Nothing in the history of the Convention evidences any intent to change United States law in this regard.

The Convention's *Rapporteur*, Mr. Philip W. Amram, consistently stated in legal journal articles, both before and after the United States ratification of the Convention, that the Convention would *enlarge* and *improve* the methods for taking evidence abroad, while preserving less restrictive practices of internal law. Amram, *The Proposed Convention on the Taking of Evidence Abroad*, 55 ABAJ 651 (1969); Amram, *Report on the Eleventh Session of the Hague Conference on Private International Law*, 63 Am. J. Int'l L. 521 (1969); Amram, *United States Ratification of the Hague Convention on the Taking of Evidence Abroad*, 67 Am. J. Int'l L. 104 (1973).

The history of United States ratification of the Convention also indicates no intent to render the Convention the exclusive method from obtaining evidence from other signatory nations.

Nothing in the report of the United States Delegation to the Eleventh Session of the Hague Conference on Private International Law, which assisted in drafting the Convention, in any way indicated that the Convention was to restrict or limit the exercise of jurisdiction by U.S. courts, or the courts of any other nation, regarding power to order production of evidence from parties over whom the court has jurisdiction. *Report of the United States Delegation to Eleventh Session of Hague Conference on Private International Law, reprinted in* 8 Int'l Legal Materials 785 (1965). The delegation noted that ". . . the Convention is designed to set *minimum* standards for international assistance." *Id.* at 808. With regard to any changes required in U.S. procedure, the delegation reported that only "minor adjustments" may have to be made, and that these adjustments were more than justified by the elimination of the formal and technical barriers to obtaining evidence frequently interposed by foreign governments. *Id.* at 820. The delegation's report in no way suggests the extensive curtailment in the jurisdiction of U.S. courts that exclusivity of the Convention would entail.

Not suprisingly, the President's Letter of Transmittal emphasizes that the Convention's intent was to *facilitate* the obtaining of evidence abroad. *Senate Exec. A, 92nd Cong., 2d Sess. (1972), reprinted at* 12 Int'l Legal Materials 323-343 (1973). While the Letter of Transmittal notes that other countries may have to make changes in their procedure to accommodate judicial assistance under the Convention, *Id.* at 323, there is no hint that the Convention changed prior United States practice or procedure.

The Report of the Secretary of State, attached to the President's Letter of Transmittal, also indicates the purpose of the Convention to eliminate barriers to procurement of evidence from foreign countries. *Id.* at 324-26. The Secretary of State concluded that the Convention required little change in United States procedures, while promoting the modernization of procedure in other states. *Id.* at 327.

The Explanatory Report on the Convention, by Mr. Amram, also attached to the Letter of Transmittal, set forth the Convention's purpose in enlarging the devices for obtaining evidence from abroad. *Id.* at 327. Nothing in the Explanatory Report in any way hints that the Convention's intent or effect is to restrict the methods available to domestic courts and litigants in obtaining evidence from foreign parties before them.

There is no indication in the history of the United States ratification of the Convention of any intent to limit the jurisdiction of U.S. courts in obtaining evidence from parties over whom they have *in personam* jurisdiction. To the contrary, the pre-adoption history of the Convention evidences an intent to expand and improve the methods of obtaining evidence from other signatory nations.

The first suggestion in the Convention's published history that some delegates considered it exclusive came during the second meeting of the Special Commission on the operation of the Hague Evidence Commission in May and June, 1985. *Report on the Second Meeting of the Special Commission on the Operation of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, *reprinted in* 24 Int'l Legal Materials 1668

(1985).[7] The Report of that meeting states that the opinions of the delegates differed on this question and that no concensus could be reached. *Id.* at 1678. The Report expounded:

> 3. The question of exclusivity of the Convention remains in issue. Under the interpretation of certain States, the Convention is not by its terms an exclusive channel for obtaining evidence located abroad. However certain States consider the taking of evidence in their territory to be a judicial act which, in the absence of permission, will violate their sovereignty, and consequently the operation of the Convention in their territory will take on an exclusive character.

Id. The Report also concluded (in very non-mandatory fashion) that "blocking statutes" enacted by foreign governments and Article 23 declarations banning request for pre-trial discovery will discourage countries from using the Convention. *Id.* at 1679. It further concluded that use of the Convention should be encouraged. *Id.*

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7. At the first meeting of the Special Commission, in June 1978, concern was expressed over the adoption by most nations of an Article 23 declaration excluding from the scope of the Convention pre-trial discovery as known in common law countries. *See, Report on the Work of the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 Int'l Legal Materials 1425 (1978); *Report of the United States Delegation to the Special Commission on the Operation of the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in* 17 Int'l Legal Materials 1417 (1978). However, there is no indication in either report that the question whether the Convention is exclusive came up at this meeting.

Thus, the history of the Convention, both before and after its adoption and ratification by the United States, fails to support the argument that the Convention is the exclusive method of obtaining evidence from Convention state nationals. Rather, its history, consistent with its language, indicates an intent to expand, not restrict, the methods available in obtaining evidence.

C. State and federal U.S. Courts almost unanimously have held that the Convention does not divest them of jurisdiction to order discovery from a party over whom they have *in personam* jurisdiction

While U.S. courts have come to differing conclusions concerning whether they *voluntarily* should first defer to the Convention before ordering production of evidence from a party over whom they have jurisdiction, they almost unanimously have agreed that they are not *required* to do so as the Convention does not divest them of jurisdiction.[8] Also, the United States, in briefs filed with this Court in this case,[9] in *Club Mediterrane, S.A. v. Dorin*, 105 S.Ct. 286 (1984) (mem.),[10] and in *Anschuetz* and *Messerschmitt*, Nos. 85-98 and 85-99, respectively, posit that the Convention does not divest U.S. courts of jurisdiction to order the production of discovery from parties over whom they have jurisdiction.[11]

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8. *See* Amicus Curiae brief of the United States, 8-9 and n.7.

9. Amicus Curiae Brief of the United States, pp. 8-9.

10 Brief of the United States as Amicus Curiae, *Club Mediterrane, S.A. v. Dorin*, 469 U.S. 1019 (1984), *reprinted* in 23 Int'l Legal Materials 1332 (1984).

11. Brief of the United States as Amicus Curiae, *Anschuetz & Co., GmbH v. Mississippi River Bridge Authority* and *Messerschmitt Bolkow Blohm, GmbH v. Walker*, Nos. 85-98 and 85-99, pp. 8-11.

The position of the Courts and the United States government is consistent with the plain language and the history of the Convention, which in no way suggests that the Convention limits the jurisdiction of courts in the United States.[12] This position taken by the courts and the United States weighs heavily against mandatory application of the Convention.[13]

II. THIS COURT SHOULD NOT ESTABLISH A HARD AND FAST RULE, AS A MATTER OF COMITY, THAT THE CONVENTION MUST FIRST BE USED IN SEEKING EVIDENCE FROM A FOREIGN PARTY OVER WHOM THE COURT HAS JURISDICTION

Petitioner[14] and some amici curiae[15] argue that this Court, as a matter of comity, should require U.S. courts to first resort to the Convention before compelling discovery from a party under U.S. discovery rules.

Such a hard and fast rule is unwise and is inconsistent with comity. Comity does not require deference to the Convention except in rare circumstances where the evidence gathering process seriously infringes on the sovereignty of the foreign nation. Serious policy considerations dictate

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12. See Argument No. I, pp. 6-16, *supra*.

13. Additionally, the United Kingdom takes the position that the Convention is not exclusive. See Amicus Curiae Brief of the United Kingdom, 4-6.

14. Brief of Petitioner, 23 *ff*.

15. Brief of amici curiae Anschuetz & Co. GmbH and Messerschmitt-Boelkow-Blohm GmbH, 14-29; Amicus Curiae Brief of the United Kingdom, 6-19.

against *always* requiring as a matter of comity deference to the Convention in obtaining evidence from foreign Convention state litigants.

A. Establishment of a concrete rule *requiring* deference to the Convention in obtaining evidence from Convention state litigants is inconsistent with comity considerations

This Court should not require, as a matter of comity, U.S. courts and litigants to, in every case, first seek discovery from Convention state litigants under the Convention. Adoption of such a hard and fast rule implies a serious conflict of sovereign interests in every situation where such evidence is sought from a Convention state national. Civil and commercial litigation involving foreign litigants, and the procurement of evidence from these litigants, is common and rarely presents a substantial threat to the sovereignty of the foreign nation. *See Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, appended to Letter of Transmittal, reproduced at* 12 Int'l Legal Materials 327 (1973).

In *Hilton v. Guyot*, 159 U.S. 113, 164-66 (1895) this Court found that comity considerations necessarily fluctuate with the facts of each case. Application of principles of comity is *and must be* uncertain: ". . . it must necessarily depend on a variety of circumstances which cannot be reduced to any certain rule." *Id.* at 164 *quoting from Saul v. His Creditors*, 5 Mart. N.S. 569, 596, 16 Am.

Dec. 212 (La. 1827).[16] Comity is voluntary and is an imperfect obligation, the extent and boundaries of which each nation must judge for itself. *Hilton v. Guyot*, 159 U.S. at 165. This Court's most recent decisions confirm that comity is insusceptible to a single, rigid and inflexible set of boundaries applicable to all cases. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *see also Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958).

Rather than the establishment of a concrete rule, comity requires balancing various factors, individual to each case, in determining *in that case* the extent to which deference should be given to a foreign law or procedure. While comity considerations necessarily vary case by case, comity always involves a balancing of competing interests, that is: (1) the extent to which recognition of the foreign law intrudes on U.S. sovereignty; (2) the extent to which application of the U.S. law would intrude on foreign sovereignty; and, as a function of balancing (1) and (2); (3) the interest of the U.S. in applying its own law and the extent to which the foreign interest can be reconciled with U.S. interests in establishing a rule applicable to the case before the Court. *See First National City Bank*, 462 U.S. at 626-634; *Sabbatino*, 376 U.S. at 408-12; *Societe*, 357 U.S. at 208-213; *Guyot*, 159 U.S. 164-65. Affecting the balancing of factors is the underlying principle that a foreign entity which seeks the benefits of doing business in the United States must

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16. "Comity of nations" has been defined as "[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws." *Black's Law Dictionary* at 242 (5th ed. 1979).

also accept the responsibilities that go along with the privilege. *First National City Bank*, 462 U.S. at 632.

B. Comity does not ordinarily require U.S. courts to defer to the Convention with regard to routine discovery requests from a foreign Convention state litigant

In determining whether comity requires deference to the sovereignty of a foreign nation, and in determining the extent of deference required, each case must turn on its own facts. Nevertheless, comity should rarely require routine discovery requests, as are sought in this case, in *Anschuetz*, and in *Messerschmitt*, to proceed under the Convention in the first instance. Any rule requiring deference to the Convention with regard to routine discovery from Convention state litigants will seriously threaten U.S. judicial sovereignty and policy. The minimal infringement of most U.S. discovery requests on the sovereignty of other nations does not outweigh the serious inroads into U.S. judicial sovereignty that routine deference to the Convention will make.

1. Requiring application of the Hague Evidence Convention to routine discovery requests from Convention state litigants seriously threatens U.S. judicial sovereignty and policy

Plaintiffs in this case, pursuant to the Federal Rules of Civil Procedure, propounded interrogatories, requests for productions of documents and requests for admissions requiring responses and documents to be produced *in the United States* by Aerospatiale, a party over whom the court has *in personam* jurisdiction. *Anschuetz* and *Messerschmitt* additionally involve production for deposition *in the United States*, witnesses over whom the foreign parties have control.

A rule *requiring* initial deference to the Convention will seriously threaten United States judicial sovereignty and will seriously erode the United States policy of full and fair discovery at a minimum of cost to the litigants.

Such a rule would make foreign courts the arbiters of the extent of information produced and the manner in which such information is produced, seriously eroding United States judicial sovereignty. *In re Anschuetz*, 754 F.2d 602, 610-11 (5th Cir. 1985); *International Society for Krishna Consciousness, Inc. v. Lee*, 105 F.R.D. 435, 446 n. 18 (S.D.N.Y. 1984) *quoting Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503, 522 (N.D.Ill. 1984). Under Article 23 of the Convention, signatory states are free to make a declaration that they will not honor requests for pre-trial discovery as known in common law countries. *See Martindale-Hubbell* at 13. Of the seventeen nations which are parties to the Convention, all but four have made a reservation limiting or prohibiting the use of the Convention in obtaining pre-trial discovery. *Id.* at 15-21. Both France and the Federal Republic of Germany (FRG) presently have in effect declarations under Article 23, which, on their face, totally prohibiting use of the Convention within their borders to obtain pre-trial discovery. *Id.*

Despite their Article 23 reservations, France and the FRG have declared that discovery can be obtained relatively easily from their respective countries. U.S. litigants, however, have described their experiences to the contrary. The United States notes in its amicus curiae brief that substantial foreign litigation concerning the appropriateness of its discovery request has resulted when it attempted to use the Convention, all with no guarantee that the information sought will ever be produced. *See* Amicus Curiae Brief of the United States, 16-18.

An American attorney similarly described his experiences with the Convention. Platto, *Taking Evidence Abroad for Use in Civil cases in the United States–A Practical Guide*, 16 Int'l Law. 575 (1982). Platto's attempt to gather evidence in the FRG involved several months of litigation in FRG courts, in addition to review by the FRG Ministry of Justice. The end result of his sojourn through the FRG legal system was that no documents were produced, although examination of witnesses was allowed. *Id.* at 581-85. Platto advises U.S. litigants to avoid use of the Convention if discovery is possible under the Federal Rules of Civil Procedure. *Id.* at 576.[17]

Also inherent in the Convention procedure is substantial expense and delay. The United States indicates that its experience in France costs over $40,000 in foreign counsel fees and two and one-half years in litigation without production of the requested testimony. *See* Amicus Curiae Brief of the United States, 16-18. Similarly, its experiences in Italy and the United Kingdom resulted in substantial expense and delay and less than satisfactory results. *Id.* Similarly, Platto describes the expense and delay associated with his use of the Convention in obtaining evidence from the United Kingdom and the FRG. Platto recommends the expense of using foreign counsel to guide the U.S. litigant through the technicalities of foreign procedure under

17. Platto notes that the "trick" to obtaining evidence under the Convention is to avoid use of the term "discovery," rather requesting only trial evidence. *Platto*, 16 Int'l Law. at 577.

the Convention. Platto, 16 Int'l Law. at 578, 580-81, 582 *ff.*[18]

The Convention mechanism, by virtue of the authority and discretion it vests with the courts and other authorities in the foreign state from which the evidence is sought, if required to be used, necessarily divests the U.S. court of substantial control over litigation and its jurisdiction over parties to the litigation. The fair administration of justice in the United States is dependent on development of the case by the parties through discovery. The resulting delays and the expense to litigants in seeking routine discovery under the Convention may threaten the ability of parties to obtain foreign discovery, thus placing the foreign litigant from whom evidence is sought, at a substantial advantage. With regard to most routine discovery, requiring deference to the Convention will substantially intrude on the judicial sovereignty of the United States. Comity does not require such an intrusion except in rare instances where the foreign interests substantially outweigh the interests of the U.S. court.

2. Routine discovery requests directed at foreign Convention state litigants rarely intrude on foreign sovereignty so as to require first resort to the Convention

Petitioner and several amici curiae submit any gathering of evidence located within a foreign nation's borders infringes on the foreign nation's judicial sovereignty unless

18. Interestingly, both the United States and Platto note that their experiences under the Convention were during attempts to obtain information from parties not involved in the U.S. litigation, and thus, from parties over whom the U.S. court had no jurisdiction. Thus, the evidence was not available except under the Convention.

the evidence is gathered pursuant to a procedure, such as the Convention, ratified by the foreign nation.[19]

Initially, whether routine discovery orders and requests requiring production **in the United States** of witnesses or information over which a litigant has control, infringe upon a foreign nation's sovereignty is subject to serious question. Such discovery does not require the presence of American attorneys on foreign soil, nor does it require the party from whom the evidence is sought to engage in any conduct within the borders of the foreign nation traditionally considered a judicial act. *See Anschuetz*, 754 F.2d at 611 *quoting from Graco*, 101 F.R.D. at 521 *and quoting from Adidas (Canada) Ltd. v. S/S SEATRAIN BENNINGTON*, 80 Civ. 1911 (S.D.N.Y. May 30, 1984). Routine discovery requests, requiring the gathering of documents or information, or the designation of witnesses in the foreign nation to be produced in the United States should not be considered judicial acts affronting the sovereignty of the foreign nation. *Anschuetz*, 754 F.2d at 611-12. Indeed, the foreign litigant performs essentially the same evidence gathering acts in preparation of its case before the U.S. court. It has not been suggested that the foreign party's preparation of its case in the foreign nation for presentation in the United States involves violation of the foreign nation's sovereignty. *Id.*, 754 F.2d at 611-12.

There are, no doubt, discovery demands seriously affronting to the judicial sovereignty of the foreign nation. For example, should the discovery request involve military

19. Petitioner's brief, 21-22, 24-25, 27-28; Amicus curiae brief of France, 14-17; Amicus curiae brief of Germany, 13-17; Amicus curiae brief of Switzerland, 8-11; Anschuetz amicus curiae brief, 8-13; Motor Vehicle amicus curiae brief, 9-10, 15.

or foreign policy information, the balance of comity interests may weigh in favor of requiring discovery to proceed under the Convention. Likewise, when the discovery must actually take place on foreign soil, such as a request for inspection of foreign property, the foreign government's interest in protecting its sovereignty is significant and may outweigh concerns of U.S. judicial sovereignty. In such circumstances, comity may require discovery to proceed under the Convention. *See Anschuetz*, 754 F.2d at 606, 608-09 *explaining Volkswagenwerk, A.G. v. Superior Court*, 123 Cal.App.3d 840, 176 Cal.Reptr. 874 (1981) and *Pierburg GmbH & Co. v. Superior Court*, 137 Cal.App.3d 238, 186 Cal.Reptr. 876 (1982). However, routine discovery requests, involving no invasion of foreign soil by American attorneys and requesting only civil or commercial information, generally involve minimal, if any, affront to the judicial sovereignty of the foreign nation. Under ordinary circumstances, this "invasion" of a foreign nation's sovereignty is non-existent or minimal and does not outweigh the judicial sovereignty of the U.S. court in compelling discovery in the United States under its domestic rules. The foreign entity, reaping the benefit of its activity in the United States, should not be able to hide behind its foreign status as to every discovery request. Absent special circumstances, discovery demands on the foreign litigant should proceed under the Federal Rules of Civil Procedure, or the applicable state rules, on equal footing with discovery demands from domestic litigants.

Likewise, foreign "blocking statutes," do not require U.S. courts to defer to the Convention with regard to routine discovery requests. This Court, in *Societe Internationale Pour Participations Industrielles v. Rogers*, 357 U.S. 197 (1958) held that foreign laws prohibiting the production of discovery information provide no barrier to the imposition of sanctions for failure to comply with discovery orders

issued under the Federal Rules of Civil Procedure. More recently, this Court has affirmed the imposition of sanctions against foreign litigants who refused to comply with a district court's discovery order. *See Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982).

While "blocking statutes" may demonstrate foreign nations' concern for protecting their sovereignty, they should not, by themselves, excuse litigants from complying with routine discovery requests under the Federal Rules of Civil Procedure. The Convention does not divest a domestic court of its jurisdiction to compel parties before it to comply with requests for evidence. *See* Argument No. I, *supra*. Likewise, a foreign nation should not be able to unilaterally divest U.S. courts of such jurisdiction by passage of a "blocking statute." Unless the foreign nation's interest, irrespective of a "blocking statute," outbalances the United States judicial sovereignty and United States interest in controlling discovery from all litigants before it, including foreign litigants, the U.S. court should be free to compel discovery by threatening or imposing sanctions within the limitations of United States discovery rules and this Court's decisions in *Societe* and *Insurance Corp. of Ireland*.

III. A CASE-BY-CASE BALANCING OF COMITY INTERESTS BEST INSURES PROTECTION OF U.S. JUDICIAL SOVEREIGNTY WHILE AFFORDING DEFERENCE TO CONVENTION PROCEDURES AND FOREIGN JUDICIAL SOVEREIGNTY

Requiring U.S. litigants, in all cases, to first seek discovery from foreign litigants under the Convention renders United States judicial sovereignty and United States discovery policy subservient to the judicial sovereignty of foreign nations. Litigants who are nationals of Convention states will have a substantial advantage in U.S. litigation. While U.S. parties and foreign parties who are not nationals of a Convention state will be subject to the full scope of discovery under liberal U.S. discovery rules, litigants who are nationals of Convention nations will be able to invoke the Convention, leaving the scope of available discovery within discretion of the foreign national's own government. Foreign governments would be free, under their Article 23 declaration, to decline to provide "pre-trial" discovery to the U.S. litigant. This would encourage concealment of discovery materials outside the U.S., and possibly encourage U.S. businesses to establish foreign subsidiaries for the purpose of concealing documents. *See Cooper Industries, Inc. v. British Aerospace*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984). "It does not require a Prometheus to forsee that United States litigants would soon find it impossible to obtain necessary discovery from foreign based parties." *Anschuetz*, 754 F.2d at 614.

On the other hand, a holding that discovery from foreign Convention state litigants should never first proceed under the Convention totally disregards legitimate concerns of foreign governments regarding violation of their judicial sovereignty by U.S. litigants.

This Court should adopt a balancing approach to application of the Convention, such as is set forth by the Fifth Circuit in *Anshuetz* and *Messerschmitt*. Whenever discovery is sought from a litigant who is a Convention state national, the judicial sovereignty of the U.S. court, its interest in assuring that all litigants are treated fairly and equally, and its interest in maintaining control over discovery and the litigation generally, must be weighed against any intrusion to the judicial sovereignty of the foreign nation. With regard to routine discovery from a foreign litigant before the U.S. court, such as interrogatories, requests for documents, and depositions of litigant-controlled witnesses, involving no intrusion of American attorneys on foreign soil, the interest of the U.S. court in proceeding under its own discovery procedures ordinarily will outweigh any minimal intrusion of the judicial sovereignty of the foreign nation. Where the discovery requests are more intrusive of the foreign nation's judicial sovereignty, such as where the requests require a property inspection in the territory of the foreign state, or where the discovery touches on state or military secrets, the foreign interests may outweigh U.S. concerns, requiring that discovery first proceed under the Convention, *even though the U.S. court has jurisdiction over the party from whom discovery is sought*. Where the U.S. court has no jurisdiction over the party, such as in the case of an independent witness, and the party will not willingly submit to discovery, the U.S. court and its litigants may have no choice but to proceed pursuant to the Convention.

Only by balancing the interests, taking into consideration the peculiar factors presented in each case, can effect be given to the purpose of the Convention in easing access to foreign evidence, while giving deference both to the legitimate jurisdictional concerns of the United States court and the foreign nation.

CONCLUSION

Gijonesa submits that this Court should reject the contention that the Hague Evidence Convention provides the exclusive method of obtaining evidence from a national of a Convention signatory state who is a party over whom a U.S. court has *in personam* jurisdiction. This Court should also reject the contention that comity always requires the U.S. court to defer to the Convention in seeking evidence from a national of a Convention signatory state. Rather, the Court should adopt a case-by-case balancing approach in accordance with the principles discussed above. Based on these principles, the Court should affirm the result reached by the Eighth Circuit.

Respectfully submitted,

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